SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

RAYMOND MARQUEZ and KADAMES MAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 375

RAYMOND MARQUEZ and RADAMES MAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 14, 1970, and on July 10, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether records seized from each petitioner individually were properly introduced against the other.

STATEMENT

Petitioners seek certiorari to the Second Circuit Court of Appeals to review that court's affirmance of their convictions under 18 U.S.C. 371 (Marquez and Mas) and 18 U.S.C. 1952 and 1953 (Mas only) in the United States District Court for the Southern District of New York. Mas was sentenced to three years' imprisonment and a $5,000 fine on each count, sentences to run concurrently. Marquez was sentenced to five years and a $10,000 fine.

This case involves a complex "numbers racket" which operated out of the Sky Club in New York City and which handled more than $80,000 per day in bets (G. 46).[1] Records of the operation were found at both the Club and the home of Petitioner Mas in Woodcliff Lakes, New Jersey (G. 2-5, 30-32, 62-64, 69). Surveillance disclosed that Mas travelled regularly from his home in New Jersey to the Sky Club (*e.g.*, G. 26-29). When Mas was arrested in his car after crossing the George Washington Bridge from New Jersey to New York City, other gambling records and $12,800 in cash were found in his possession (G. 5-10, 65-67).

The records seized at Mas' home included a master control sheet (G. 63), listing "controllers" in the

[1] References are to the government's appendix in the court of appeals, here designated as "G.".

operation, on which the fingerprints of petitioner Marquez were found (G. 23-25). Surveillance established that Marquez was frequently at the Sky Club, sometimes handing out money (G. 71, Item 1) and seemingly giving instructions (G. 71) in the company of Mas and others (G. 25-30).

When Marquez was arrested on May 14, 1969, a slip of paper on his person (G. 68) contained several notations also found on the master control sheet, on gambling slips seized in Mas' home, and on the address book seized from Mas. Between Marquez and a companion in his car was a paper bag containing $9,500 in cash and a note (G. 15-22, 68) referring to "Ray" and "Jim" (mentioned in Mas' address book (G. 65)). On Marquez' person was found a note pad (G. 68) assigning numbers to: "ME", a designation found on the master control sheet (G. 63), "Al" and "Sam", found in Mas' address book (G. 65) and "Teta", found on slips seized in Mas' house (G. 64). All of these materials, seized from Marquez at the time of his arrest, were admitted in evidence.

The "Firpo letter" (reproduced at G. 62), which is the subject of petitioners' second argument, was found at Mas' home (G. 3) in the suitcase which contained the master control sheet (G. 63) on which Marquez' fingerprints were found (G. 23-25). The letter was marked, "Attention Boss," and indicated that a dispute had arisen concerning payments to a bettor who had scored a "hit" (had picked the winning number) on the date covered by the master control sheet. Sums mentioned in the letter matched figures in the master control sheet.

The letter was offered along with a large number of other gambling records obtained from Mas' home (G. 10-15). Defense counsel meticulously examined each item of evidence and raised specific objections to a number (G. 10-11). They made only the general objection of lack of foundation and lack of connection in the case of this letter and a number of other records (G. 12); they first objected on grounds of hearsay in the court of appeals.

ARGUMENT

1. The evidence obtained at the time of the arrest was properly admitted against both defendants. As the court below noted, the money and notebook seized from Marquez were real evidence and not "declarations." Hence, they were admissible without regard to whether the conspiracy had terminated under the rule of *Lutwak* v. *United States*, 344 U.S. 604, 607.

2. The "Firpo" letter was not hearsay. The statement "Attention Boss" was not used to prove that Marquez was the boss as petitioners contend. It was used only to confirm the expert testimony that the master control sheet which was found in the same box and on which Marquez' fingerprint appeared was used in a gambling operation. The letter was simply a circumstance tending to show the nature and existence of the conspiracy. The government relied upon other evidence to prove Marquez' participation (G. 59-60).

Even if the letter were considered to be the declaration of a co-conspirator, the court was not required to instruct the jury that it should not consider the

letter against Marquez unless it first found beyond a reasonable doubt that he was a member of the conspiracy. While some circuits require a jury to find some independent evidence of participation in a conspiracy before considering declarations of a co-conspirator, the better rule and modern tendency is to hold that the issue of adequacy of the proof *aliunde* to connect individual defendants to the conspiracy is for the judge to decide in light of all the evidence. *United States* v. *Nuccio*, 373 F. 2d 168, 173 (C.A. 2), certiorari denied, 387 U.S. 906; *United States* v. *Ragland*, 375 F. 2d 471, 479 (C.A. 2); *Carbo* v. *United States*, 314 F. 2d 718, 736-737 (C.A. 9), certiorari denied, 377 U.S. 953.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted.

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